Dr Ramachandran a/l Sivaguru v Perwira Habib Bank Malaysia Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D2-22-552-92
SITI NORMA YAAKOB J
7 JUNE 1993

Civil Procedure *— Judgment — Setting aside — Fresh action filed to set aside regularly obtained judgment — Whether earlier judgment obtained by fraud — Whether there was further evidence that could not be adduced in earlier suit*

Civil Procedure *— Pleadings — Application to strike out writ and statement of claim*

In an earlier suit, the first defendant had sued the plaintiff on a guarantee which the plaintiff had executed in favour of the first defendant in respect of a term loan granted by the first defendant to the second defendant. Judgment was given to the first defendant when the plaintiff failed to fulfill the condition imposed by the learned judge in the earlier suit, before leave to defend the first defendant's O 14 application would be given. The plaintiff did not appeal against the judgment but instead filed this suit five years later to have the judgment set aside. The first defendant has now applied to strike out the writ and the statement of claim under O 18 r 19 and under the inherent jurisdiction of the court.

Held, dismissing the plaintiff's application and allowing the first defendant's application:

(1) Where a plaintiff has filed fresh proceedings to impeach the judgment, he must show that either the judgment in the earlier suit was obtained by fraud or that he has now further evidence which could not possibly have been adduced in the earlier suit.

(2) All the objections raised by the plaintiff in this case could easily have been raised by him in the earlier O 14 proceeedings, and to re-open the same issues in a fresh action is an abuse of the powers of the court and to that extent, res judicata in the wider sense applies to nullify the present proceedings against the first defendant.

(3) The plaintiff therefore had no cause of action against the defendant and the defendant's application to have the plaintiff's writ and statement of claim struck out was allowed.

[Bahasa Malaysia summary

Dalam suatu guaman terdahulu, defendan pertama telah mendakwa plaintif di atas suatu jaminan yang telah disempurnakan oleh plaintif untuk faedah defendan pertama berkenaan dengan suatu pinjaman bertempoh yang telah diberikan oleh defendan pertama kepada defendan kedua. Penghakiman telah diberikan kepada defendan pertama apabila plaintif gagal untuk memenuhi syarat yang telah dikenakan oleh hakim dalam guaman yang terdahulu, sebelum

kebenaran untuk membela permohonan A 14 defendan pertama boleh diberikan. Plaintif tidak merayu terhadap penghakiman itu tetapi sebaliknya memfailkan guaman ini lima tahun kemudian untuk mengetepikan penghakiman itu. Defendan pertama kini memohon untuk membatalkan writ dan pernyataan tuntutan di bawah A 18 k 19 dan di bawah bidangkuasa mahkamah yang tersedia ada.

Diputuskan, menolak permohonan plaintif dan membenarkan permohonan defendan pertama:

(1) Jika seseorang plaintif memfailkan prosiding baru untuk mencabar penghakiman itu, beliau dikehendaki menunjukkan bahawa penghakiman dari guaman yang terdahulu itu telah diperolehi secara fraud ataupun bahawa beliau kini mempunyai keterangan tambahan yang tidak mungkin dikemukakan di dalam guaman yang terdahulu itu.

(2) Segala bantahan yang ditimbulkan oleh plaintif di dalam kes ini boleh ditimbulkan di dalam prosiding A 14 yang terdahulu dengan mudah, dan dengan membentangkan semula isu-isu yang sama di dalam suatu tindakan baru ini merupakan suatu penyalahgunaan kuasa mahkamah dan setakat itu, res judicata dalam maksud yang lebih berleluasa boleh digunakan untuk membatalkan prosiding ini terhadap defendan pertama.

(3) Oleh yang demikian, plaintif tidak mempunyai sebarang kausa tindakan terhadap defendan dan permohonan defendan untuk membatalkan writ dan pernyataan tuntutan plaintif dibenarkan.]

[*Editorial Note*: The plaintiff has appealed to the Supreme Court vide Civil Appeal No 02–219–93.]

Notes

For a case on setting aside regularly obtained judgments, see 2 *Mallal's Digest* (4th Ed) para 1338.

For cases on the striking out of a writ and statement of claim, see 2 *Mallal's Digest* (4th Ed) paras 1828–1831.

Cases referred to

1 *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 (refd)

2 *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581 (refd)

KS Dass (*K Sila Dass & Partners*) for the plaintiff/respondent.
Yoong Sin Min (*Shook Lin & Bok*) for the first defendant/applicant.

Cur Adv Vult

Siti Norma Yaakob J: In these proceedings, the plaintiff seeks to set aside the judgment dated 6 April 1987, obtained by the first defendant against him in Kuala Lumpur Civil Suit No C23–1879–86. In applying to set aside the writ and statement of claim under O 18 r 19 and under the inherent

jurisdiction of the court, the first defendant has disclosed the following facts.

In Civil Suit No C23–1879–86 ('the earlier suit'), the first defendant had sued the plaintiff on a guarantee dated 28 February 1984, which the plaintiff had executed in favour of the first defendant in respect of a term loan of RM200,000 granted by the first defendant to the second defendant. The second defendant was not a party to the earlier action.

Order 14 proceedings were commenced by the first defendant against the plaintiff in the earlier suit. The plaintiff, who was represented by counsel at all times, opposed the O 14 application and on 6 April 1987, Shankar J granted leave to the plaintiff to defend the earlier suit on the condition that he deposited RM120,000 into court within three weeks of the order, failing which judgment for the amount claimed by the first defendant would be entered against the plaintiff with interest and costs. The plaintiff failed to make the deposit within the time limited and as a result, the judgment crystallized. The plaintiff has not appealed against the judgment but instead filed this suit five years later to have the judgment set aside based on the following grounds:

(1) The first defendant did not check his background and that they would not be relying on the guarantee.
(2) The first defendant had suppressed material information from the plaintiff in that the loan had already been disbursed to the second defendant before the guarantee was executed.
(3) Another security given for the term loan, a charge, was not provided by a company known as Tajaria Sdn Bhd in accordance with the first defendant's letter of offer.
(4) The first defendant had not obtained a proper valuation over the charged land.

The law on the setting aside of judgments regularly obtained is clearly set out by the then Federal Court in the case of *Hock Hua Bank Bhd v Sahari bin Murid*,[1] [at p 144], to be the following:

> Clearly the court has no power under any application in the same action to alter, vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, except under the slip rule in O 28 r 11 [of the Rules of the Supreme Court 1980] ... so far as is necessary to correct errors in expressing the intention of the court ... But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment ...

Since the plaintiff has filed fresh proceedings to impeach the judgment, he must therefore show that either the judgment in the earlier suit was obtained by fraud or that he has now further evidence which could not possibly have been adduced in the earlier suit.

From his statement of claim, it is clear that the plaintiff relies on both fraud and the possession of further evidence to have the judgment set aside and since they are interrelated and have a bearing to the four grounds that I have listed above, I shall now deal with these grounds to determine whether the plaintiff has a cause of action against the first defendant.

The plaintiff has admitted that he had executed the guarantee. He is a doctor, a highly educated person, and he must therefore have known the consequences of his action when he signed the guarantee. The fact that the first defendant had accepted him as a guarantor is a clear indication that the first defendant must have been fully satisfied of his credentials and from the very nature of the document that he executed, the plaintiff must realize that certain obligations on his part had been created which, if unfulfilled, would entitle the first defendant to enforce the guarantee. This had in fact happened. The second defendant had defaulted on the term loan as he failed to make repayment and this entitled the first defendant to enforce the guarantee which the plaintiff had given. To that extent, objection as to how the first defendant should react when dealing with a proposed guarantor is a non-issue.

The guarantee had been dated 28 February 1984, and the plaintiff alleges that the first defendant had not informed him of the fact that the second defendant had withdrawn a substantial part of the loan the same day and the balance on 9 March 1984, from his current account which he had opened with the first defendant on 22 February 1984, with a deposit of RM500. For this, the plaintiff relies on the statement of account of the second defendant issued by the first defendant.

From the statement, it is clear that the second defendant had a credit of RM500 in his account as at 22 February 1984. On 23 February 1984, there was a debit of RM3.75, thereby leaving a credit of only RM496.25. On 28 February 1984, there was a large withdrawal of RM150,002.15 and, against a credit of only RM496.25, it can only mean that the second defendant's account was not a current account but an overdraft account which was a distinct and separate account and had nothing to do with the term loan or the guarantee executed by the plaintiff. In that respect, the first defendant had also sued the second defendant in Kuala Lumpur Civil Suit No 24–3375–86 for sums due on the overdraft account and to that extent, there is no truth in the plaintiff's allegation that the first defendant had suppressed the information that the loan had been disbursed to the second defendant before he executed the guarantee. In fact nothing of that kind happened as the loan of RM200,000 was only disbursed to the second defendant on 8 February 1985, after the other security for the loan, a land charge, had been executed in favour of the first defendant. This is evidenced by the first defendant's statement of accounts in respect of the second defendant's term loan.

As I have indicated above, besides the plaintiff's guarantee, the other security for the term loan was a charge which, under the first defendant's letter of offer dated 29 February 1984, was to be created by Tajaria Sdn Bhd, a housing developer, over a piece of property which was purchased by the second defendant with the term loan. The charge that was created on 7 November 1984, was not executed by Tajaria Sdn Bhd but by the second defendant instead and the objection raised by the plaintiff was that the charge was contrary to the letter of offer.

The first defendant has explained that Tajaria Sdn Bhd has since transferred the property, which is a link house, to the second defendant and

that is why the charge was created by the second defendant and not the company. Since the security is the very same security that was agreed to in the first defendant's letter of offer, objection as to a different chargor giving the security is immaterial and is of no consequence. If there is anybody who should object to the charge, that person would be the first defendant but I consider, in the circumstances, the first defendant has no cause to object as what was important to the first defendant was that the security and the charge that was created was the very same security that had been agreed to and, since a charge can only be executed by the legal owner of the property, it follows that only the second defendant could create the charge as the link house had already been transferred to him by Tajaria Sdn Bhd.

As for the plaintiff's objection that there was no proper valuation done over the charged property, here again there is no cause for complaint as, firstly, he has no proprietory rights over the property. His liability is governed by the terms of the guarantee he executed and under cll 3, 5 and 6 of the guarantee, the first defendant can deal with any other security as they deem fit.

All the objections raised by the plaintiff could easily have been raised by him in the O 14 proceedings in the earlier action. This is so, as all facts must have been known to him then and he was represented by counsel. To re-open the same issues in this fresh action which could easily have been raised and litigated upon in the earlier trial, is an abuse of the powers of the court and to that extent, res judicata in the wider sense applies as to nullify the present proceedings against the first defendant. See the case of *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor*.[2]

There is also no evidence of the allegations of fraud, false misrepresentation or conspiracy averred to by the plaintiff in his statement of claim as to the obtaining of the judgment and, in the circumstances of this case, the filing of this suit is nothing more than a means to circumvent the time bar for appeal. To that extent, his claims lack bona fides and appear as nothing more than an attempt to delay bankruptcy proceedings which have already been commenced against him in respect of the same judgment.

For the reasons I have given, the plaintiff has no cause of action against the first defendant and on that conclusion, I had allowed the first defendant's application to have the writ and statement of claim issued by the plaintiff struck out with costs.

Order accordingly.

Reported by Lim Chee Wee